INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	4
Conclusion	13

CITATIONS

Cases:

Arizona Grocery Co. v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370	12
Capital Airlines, Inc. v. *Civil Aeronautics Board*, 171 F. 2d 339, certiorari denied, 336 U. S. 961	4, 5, 10, 12
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591	10
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575	11, 12
Galveston Electric Co. v. *City of Galveston*, 258 U. S. 388	12
Georgia Railway & Power Co. v. *Railroad Commission*, 262 U. S. 625	12
Griffin v. *United States*, 110 C. Cls. 330, *reversed sub nomine United States* v. *Jones*, 336 U. S. 641	11
Interstate Commerce Commission v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14	11
Missouri Pacific R.R. Co. v. *United States*, 59 C. Cls. 524	11
Munn v. *Illinois*, 94 U. S. 113	11
Nebbia v. *New York*, 291 U. S. 502	11
New York Central R. Co. v. *United States*, 65 C. Cls. 115 affirmed, 279 U. S. 73	11
Pipe Lines Cases, The, 234 U. S. 548	11
TWA v. *Civil Aeronautics Board*, 336 U. S. 601	5, 6, 8, 12
United States v. *Jones*, 336 U. S. 641	5, 7, 8, 9
United States v. *New York Central R. Co.*, 279 U. S. 73	11

Constitution and Statutes:

Constitution of the United States:	
Fifth Amendment	5, 10, 11

Constitution and Statutes—Continued

	Page
Civil Aeronautics Act of 1938 (Act of June 23, 1938, 52 Stat. 973, as amended, 49 U. S. C. 401, *et seq.*)	2
Sec. 1	2
Sec. 2	
Sec. 401(e)	10
Sec. 401(h)	3
Sec. 401(k)	3
Sec. 401(m)	10
Sec. 404	10
Sec. 406	8
Sec. 406(a)	3, 11
Sec. 902	3
Sec. 1006	4, 11
Interstate Commerce Act, 49 U. S. C. 1, 15	10
Railway Mail Pay Act, 39 U. S. C. 542	8

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 280

CAPITAL AIRLINES, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 8-17) is reported at 90 F. Supp. 926.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1950 (R. 17). The petition for a writ of certiorari was filed on August 30, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTIONS PRESENTED

1. Whether the Court of Claims has jurisdiction to increase the rate of compensation paid to an

air carrier certificated under the Civil Aeronautics Act for the transportation of mail by air, and to award it a money judgment to reimburse it for losses incurred under a rate established by the Civil Aeronautics Board pursuant to its statutory authority "to fix and determine * * * the fair and reasonable rates of compensation for the transportation of mail by aircraft * * * ."

2. Whether the provisions of the Civil Aeronautics Act that air carriers holding certificates of convenience and necessity (issued to them upon their own application) shall furnish the air transportation so certificated, involve a taking of property entitling a carrier to just compensation under the Fifth Amendment for losses sustained while operating under rates fixed by a Board order which the carrier did not seek to have set aside as confiscatory or unlawful.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938 (Act of June 23, 1938, 52 Stat. 973, as amended, 49 U. S. C. 401, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

The pertinent allegations of petitioner's complaint in the Court of Claims follow (R. 1-7):

Petitioner, Capital Airlines, Inc., is an "air carrier," as defined in Section 1 of the Civil Aeronautics Act of 1938, and is engaged in the air

transportation of passengers, property and mail, authorized by certificates of convenience and necessity issued to it by the Civil Aeronautics Board in accordance with the Act (R. 1). Under the Act petitioner could continue to engage in such air transportation in which it had been engaged prior to the Act's enactment only if it applied for and obtained from the Board certificates authorizing these services (R. 1). From and after the issuance of these certificates for which it applied, petitioner was required by various sections of the Act to provide the air transportation services authorized by the certificates, including the transportation of mail tendered it by the Postmaster General, and, in addition, to provide safe and adequate services and facilities for such transportation (R. 2).[1] For the furnishing of these services and the use of its property "under the compulsory provisions of the Act," petitioner claimed that it was entitled to receive just compensation under the Fifth Amendment (R. 2).

On December 16, 1942, the Board, acting under Section 406(a), fixed a rate of .3 mill per pound mile to be paid petitioner for the mail transportation services which it might thereafter be required to furnish (R. 3-4). This rate which continued in

---

[1] According to petitioner, Section 401(k) of the Act prohibited it from abandoning any route or part thereof for which it had received a certificate, Section 902 declared violations of these obligations to be criminal offenses, and Section 401(h) authorized the Board to revoke issued certificates for failure to comply therewith (R. 2).

effect until January 13, 1947 [2] was sufficient until September 1, 1945, but insufficient thereafter to "accomplish the payment of just compensation" (R. 4). During the period from September 1, 1945 to January 13, 1947, petitioner sustained a net aggregate loss of $3,560,566 and had an average invested capital of $14,434,823 on which it earned no return (R. 4). On this basis, petitioner computed that the just compensation to which it was entitled amounted to $5,793,308 plus interest (R. 4) and accordingly prayed judgment for that sum (R. 7).

The Court of Claims sustained the demurrer filed by the United States on the grounds, advanced by the Government (R. 7), that (1) the court lacked jurisdiction to grant the relief sought, and (2) the complaint did not allege facts sufficient to entitle petitioner to the relief sought or to constitute a cause of action (R. 8-17).

ARGUMENT

The present proceeding was instituted in the Court of Claims shortly after this Court denied

[2] On January 14, 1947, petitioner applied for reconsideration and adjustment of the rate for the past as well as a rate adjustment for the future. The Board dismissed the portion of the application relating to past rates on the ground that it had no power under the Act to adjust the mail rate for any period prior to the filing of a petition (R. 6). Upon petition for review filed under Section 1006, the Court of Appeals for the District of Columbia Circuit affirmed (*Capital Airlines, Inc.* v. *Civil Aeronautics Board*, 171 F. 2d 339) and this Court denied certiorari (336 U. S. 961) (R. 6-7). In fixing the rate for the future, the Board made no allowance for petitioner's past losses (R. 7).

certiorari in petitioner's suit against the Board (*Capital Airlines, Inc.* v. *Civil Aeronautics Board,* 171 F. 2d 339, certiorari denied, 336 U. S. 961) in which the Court of Appeals for the District of Columbia Circuit had held that the Board was without power retroactively to adjust the mail rate paid to an air line for the purpose of reimbursing it for the losses suffered prior to the filing of an application for a rate adjustment. This holding, which this Court confirmed in *TWA* v. *Civil Aeronautics Board,* 336 U. S. 601, defeated petitioner's attempt to obtain reimbursement, within the framework of the Civil Aeronautics Act, for the losses incurred during the period from September 1, 1945 to January 13, 1947, when the mail rate fixed in the Board's rate order of December 16, 1942 was allegedly unduly low.

In the present proceeding, petitioner is seeking a money judgment from the Court of Claims to reimburse it for these losses. Although petitioner has framed its complaint as one for just compensation for a taking under the Fifth Amendment, it in effect is requesting the Court of Claims (1) to find that the rate fixed by the Board's 1942 rate order failed to provide a certain minimum of revenue from 1945 to 1947 and (2) to make up the deficiency by granting a money judgment. The holding of the Court of Claims that it lacked jurisdiction so to review and revise the Board's 1942 rate order halted *in limine* petitioner's further

efforts to transform mail rate regulation under the Civil Aeronautics Act "into a cost-plus system of regulation, a construction which would not harmonize with the apparent design of the Act" (*TWA* v. *Civil Aeronautics Board, supra,* at p. 606), and is, we submit, fully supported by this Court's recent decision in *United States* v. *Jones,* 336 U. S. 641. Moreover, the additional holding below that petitioner's complaint failed to state a cause of action for a "taking" of its property entitling it to just compensation under the Fifth Amendment is likewise clearly correct. We accordingly submit that certiorari is unwarranted.

1. Contrary to petitioner's contentions (Pet. 8, 15, 23-29), the *Jones* case fully supports the holding of the Court of Claims that it lacked jurisdiction to entertain petitioner's claim. In that case, a railroad, seeking a money judgment in the Court of Claims, similarly claimed that the mail rates fixed by the Interstate Commerce Commission "do not afford just compensation under the Fifth Amendment on the ground that they do not provide for payment of the cost of the service rendered plus a reasonable return upon invested capital * * * " (336 U. S. at 646). This Court specifically held that the Court of Claims lacked jurisdiction to entertain such a suit and based that holding principally on the ground that not only had "Congress in no instance * * * expressly empowered the Court of Claims to review rate orders of the

Commission, either to set them aside or to render a money judgment for additional amounts * * *," (*supra,* at p. 651), but:

> To infer such an intention would be contrary not only in spirit to the limitations Congress has placed upon review of such orders wherever expressly provided, but also to the whole history and practice of Congress in conferring jurisdiction on the Court of Claims.
>
> * * * The limitations exemplify settled congressional policy concerning the relations of rate-making bodies and reviewing courts. Not only is rate making essentially legislative in the first instance. The policy of judicial restraint is one having regard for the expertise of special agencies charged with performing the rate-making function and for the inherent actual, as well as legal, disability of courts to execute that function. [pp. 651-652]

"And," said the Court, "this is as true of the jurisdiction of the Court of Claims" as of any other court (pp. 652-653).

> Hardly can it be conceived therefore that Congress would have provided expressly for review of the Commission's rate-making orders by the Court of Claims; or that, if it had done so, it would have authorized a money judgment for such amount as that court in its own judgment considered the rate should have produced. [p. 653]

The lack of Court of Claims jurisdiction in the instant proceeding follows *a fortiori* from the *Jones*

case. The Civil Aeronautics Act, like the Railway Mail Pay Act (39 U. S. C. 542), vests in the administrative agency, here the Board, exclusive jurisdiction to determine "fair and reasonable rates of compensation for the transportation of mail by aircraft." Section 406. This provision, this Court has already noted, follows the conventional patterns of rate making. *TWA* v. *Civil Aeronautics Board, supra,* at 605. In addition, unlike the Railway Mail Pay Act,[3] the Civil Aeronautics Act contains express provision for judicial review of the Board's orders, and has vested such review powers, not in the Court of Claims but in the courts of appeals. Section 1006. There accordingly is no basis here for even suggesting, as did the carrier in the *Jones* case, that the Court of Claims has any jurisdiction in the premises, a suggestion which this Court flatly rejected as "contrary * * * to the whole history and practice of Congress in conferring jurisdiction on the Court of Claims" (336 U. S. at 651-652).

Furthermore, this Court expressly stated in the *Jones* case that the Court of Claims lacked jurisdiction even though the claim for reimbursement of losses be framed, as petitioner attempts to do here, as one for just compensation under the Fifth Amendment (336 U. S. 669-670). The Court of

---

[3] As pointed out in the *Jones* case, "* * * the Railway Mail Pay Act contains no explicit provision for judicial review of orders of the Interstate Commerce Commission fixing rates of pay for transporting the mails pursuant to authorizations of the Postmaster General for such service * * *" (at p. 647).

Claims, this Court noted, "has jurisdiction only to render a money judgment against the United States and none to remand to the Commission for further consideration a rate order which it might find confiscatory" (336 U. S. at 670) and that the rendering by the Court of Claims of a "final judgment for the amount by which it had found the order confiscatory * * * not only would short-circuit the Commission in the rate-making process, but would involve substituting the court's judgment for the Commission's as to the amount of any new rate which might be fixed." "Consequently," the Court stated, "we do not think this case falls within * * * [the just compensation] category of jurisdiction * * *" (at pp. 670-671). By the same token, petitioner's formulation of its claim here as one for "just compensation" under the Fifth Amendment no more serves to vest the Court of Claims with jurisdiction over it than did the similar formulation in the *Jones* case.

2. In any case, the Court of Claims properly held that the complaint "fails to state a cause of action against the United States entitling [petitioner] to the relief sought", for the allegations of the complaint plainly show that there had in fact not been any "taking" of petitioner's property entitling it to just compensation under the Fifth Amendment (R. 16).

Petitioner's position is premised on the fallacious assumption that the Civil Aeronautics Act im-

posed a mandatory requirement upon it to furnish air transportation services (Pet. 2-3). But the Act requires that these services be furnished only by those authorized by their certificates to perform such services (see, *e.g.*, Sections 401(m), 404) and leaves an option to the carrier whether it wishes to apply for such certificates. Hence, although petitioner is now required to perform these services by virtue of its certificates, it voluntarily "chose to operate" under the Act (*Capital Airlines, Inc.* v. *Civil Aeronautics Board, supra,* at 340) by applying for certificates of public convenience and necessity under Section 401(e). The fact that having received the requested certificates it thereafter is required to perform certain services plainly does not convert its original request for the privilege of performing these services, made in full knowledge of the concomitant obligations, into a "taking" compensable under the Fifth Amendment.

In addition, the various obligations which petitioner, as a certificated air carrier under the Civil Aeronautics Act, is required to discharge are of the same general nature as those which other regulated common carriers are required to discharge. See, *e.g.*, 49 U. S. C. 1, 15 (Interstate Commerce Act). The imposition of these obligations involves a proper exercise of the legitimate regulatory power of the Government, and not a "taking" compensable under the Fifth Amendment. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320

U. S. 591, 601; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 582 and 603 (Mr. Justice Black concurring); *Munn* v. *Illinois*, 94 U. S. 113, 134; cf. *Nebbia* v. *New York*, 291 U. S. 502, 534-539; *The Pipe Line Cases*, 234 U. S. 548; *Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, 47 (Mr. Justice Cardozo, dissenting).[4] To be sure, the Board in fixing "fair and reasonable" rates under Section 406 (a) cannot establish confiscatory rates. If a carrier regards the rates fixed by the Board as confiscatory, it has a remedy under Section 1006, which provides for judicial review of Board orders. No such remedy is here sought.

Finally, petitioner's allegation that it suffered a loss from 1945 to 1947 under the 1942 rate order does not convert its claim into one for a taking. This Court has already made it clear that the rate regulation provisions of the Civil Aeronautics Act read "like a typical public utility rate-making

---

[4] *United States* v. *New York Central R. Co.*, 279 U. S. 73, relied on by petitioner (Pet. 5, 7, 12-13, 16-17), does not support its position. Although this Court there held that compensation is a constitutional requisite to compulsory carriage of the mail, it did not hold, nor does it follow, that the applicable constitutional provision is just compensation under the Fifth Amendment. Indeed, the Court of Claims, whose decision this Court affirmed, specifically noted there that it was not determining just compensation but was "giving effect to an authorized order of the Interstate Commerce Commission." 65 C. Cls. 115, 128. See, also, *Missouri Pacific Railroad Co.* v. *United States*, 59 C. Cls. 524, 532; *Griffin* v. *United States*, 110 C. Cls. 330, 373, reversed on other grounds, *sub nomine United States* v. *Jones*, 336 U. S. 641.

authority," follow "the conventional pattern," and do not break with the "traditions of rate-making." *TWA* v. *Civil Aeronautics Board, supra,* at 604, 605, fn. 5. One of the firmly established principles of public utility rate making—a principle which was deemed pertinent even when eminent domain principles were applied—is that the regulated utility is not guaranteed against losses; "the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business." *Federal Power Commission* v. *Natural Gas Pipeline Co., supra,* at 590; see, also, *Galveston Electric Company* v. *City of Galveston,* 258 U. S. 388, 395; *Georgia Railway & Power Company* v. *Railroad Commission,* 262 U. S. 625, 634; *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 284 U. S. 370, 387. Similarly, the Civil Aeronautics Act "with its regulatory provisions, is not intended to underwrite profitable operation of a carrier's business, any more than statutes imposing regulations of public utilities are intended to insure them a net revenue." *Capital Airlines, Inc.* v. *Civil Aeronautics Board, supra,* at 340.

CONCLUSION

The decision below is correct and there is no conflict of decisions. We respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
SAMUEL D. SLADE,
MELVIN RICHTER,
Attorneys.

OCTOBER 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 909643 217